

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

CONSUELO GONZALES,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES, COLORADO STATE VETERANS CENTER,

Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on August 25 and 26 and September 12, 2005, at the State Personnel Board, 633 17th Street, Suite 1320, Denver, Colorado. The record remained upon until September 26, 2005 for submission of Closing Arguments. Matthew K. Hobbs, Esquire, represented Complainant. Joseph Haughain, Assistant Attorney General, represented Respondent.

MATTER APPEALED

Complainant, Consuela Gonzales ("Complainant" or "Gonzales"), appeals her disciplinary termination of employment by Respondent, Department of Human Services, Colorado State Veterans Center ("Respondent" or "Veterans Center"). Complainant seeks reinstatement, back pay, benefits, and attorney fees and costs.

For the reasons set forth below, Respondent's action is **affirmed**.

ISSUES

1. Whether Complainant committed the acts for which she was disciplined;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the reasonable range of alternatives available to the appointing authority;
4. Whether Complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

General Background

1. Complainant commenced employment at the Veterans Center in 1991. She is certified as a nursing home activities director and served in that capacity at the Veterans Center from 1991 through 1999.
2. At all times relevant herein, Complainant was the Activities Coordinator at the Veterans Center. She reported directly to Esther Espinosa, Social Services Director.
3. Complainant was responsible for: planning and presenting all activities for the residents; assessing the activities needs of each resident and documenting it in the medical record; creating an activities care plan for each resident; maintaining the resident participation logs; budgeting all activities; assisting residents with shopping; and other miscellaneous duties.
4. The Veterans Center consists of two facilities: a nursing home and an assisted living facility known as the Domiciliary.
5. For the past few years, Complainant has been exclusively responsible for running the Activities Program in the nursing home and the Domiciliary. During this period, the Veterans Center was short staffed, and Complainant performed the job of at least one and a half full time employees. She received sporadic assistance from other staff.
6. Complainant's Classification was Clinical Therapy Assistant I. Her working title was Activity Coordinator – Nursing Home. Complainant disagreed with her Classification and believed she should have been a Clinical Therapy Assistant II. She wrote, "Disagree, Classification of a I should be a II," on her 2004 Position Description Questionnaire. She never formally submitted a request for reallocation of position form. She never grieved her appointing authority's failure to request that her position be reallocated.

Resident DM and the June 2004 Corrective Action

7. DM was a 93-year old resident in the Domiciliary. He was wealthy, and he talked about his wealth with Veterans Center staff and residents. DM also had no heirs. Complainant learned of his wealth and lack of heirs through her employment at the Veterans Center.
8. DM was unhappy living in the Domiciliary. He often wrongly accused staff of stealing from him. In the Spring of 2004, he informed staff that he wanted to move in with Complainant, marry her, and pay for her education. The staff passed on this information to Complainant.
9. Complainant went to see DM. He told her that he planned to move out of the

2005B091

Veterans Center and asked if he could move in with Complainant. She responded that she didn't know if it was legal, or if she could do so. She spoke to the Ombudsman and her parents. The Ombudsman advised her that DM was not in the state's charge and could make his own decisions, but that Complainant should discuss the plan with the Veterans Center Administrator, Cynthia Bostic.

10. Complainant did not talk to Administrator Bostic about her thoughts to have DM move in with her.

11. Complainant decided to allow DM to move in with her and discussed her decision with DM. She and DM agreed he would pay her \$1500.00 in rent. She took DM to see her accountant in order to assure that the rent money would not disqualify her daughter from receiving financial aid for college.

12. When DM asked Complainant to marry her, she said no. Nonetheless, DM repeatedly informed staff at the Veterans Center that he was going to marry Complainant. She was aware he was telling others this.

13. Complainant accepted \$200.00 from DM and used it to rent storage space for his belongings. She did not use any of that money for her own benefit.

14. When the Veterans Center administrators learned about Complainant's plan to have DM move in with her, they sent her a letter scheduling a pre-disciplinary meeting.

15. Complainant changed her mind and informed DM that he could not move in with her.

16. In May 2004, Respondent held a pre-disciplinary meeting with Complainant and her union representative to discuss allegations that Complainant had engaged in resident exploitation. At the meeting, Complainant admitted that she had had discussions with resident DM about his leaving the facility, moving into a Comfort Inn hotel for a few days, and then moving in with her. She further admitted to having taken DM to her tax accountant and discussing the possibility of entering into the financial arrangement wherein he would pay her \$1500.00 per month in rent.

17. At the pre-disciplinary meeting, Complainant stated that she had decided against having DM move into her home after he had asked her to marry him and had stated he didn't want her to increase his rent or he would be "living under a bridge in a card board box." She also stated that she had decided against having DM move in because it would compromise her freedom, and she did not want to cook and clean for him when she came home every night.

18. At the meeting, Complainant was asked why the plan was for DM to move into the Comfort Inn, prior to moving into her residence. Her response was, "Just uh – that so it wouldn't look like he was coming . . . I wasn't too clear I mean I had – I wasn't clear – I said move into the Comfort Inn and I'll go pick you up. Yeah so you could be completely out of

2005B091

the state.”

19. When asked if she had talked to the Veterans Center Social Worker about the plan to have DM move in with her, Complainant responded, “No and I wish they would have come to me. This was no secret.” She stated that the Social Worker had been aware that DM was planning to move in with her.

20. When asked if she had discussed her plan with Veterans Center Nursing Home Administrator Cynthia Bostic, Complainant responded that the Ombudsman had told her to do so, that she had not done so, and stated, “20/20,” indicating that she realized she should have.

21. Complainant had also recently brought home an Activity Participation Log in order to catch up on that charting. The surveyors were coming to the facility soon and she was behind in the charting.

22. On June 8, 2004, John E. Johnson, a Nursing Home Administrator for Respondent in Florence, issued the Corrective Action against Complainant. The Corrective Action stated in part,

“your actions created the perception of impropriety, which concerned other staff members resulting in the allegation of exploitation.”

“financial matters are normally handled by the Social Work Department of the facility, as you know. Your job, in Activities, does not extend to, nor justify, the actions that you took. A resident of the Domiciliary can use their money as they choose, which is one of their resident rights. However, as State employees and direct service providers, we cannot benefit or gain from our professional relationship with the vulnerable people that we serve.”

“Please be mindful that Rule 1-10 of the State Rules and Regulations indicates that ‘no employee is allowed to accept any fee, compensation, gift, reward, gratuity, expenses, or other thing of monetary value that could result in preferential treatment, impede governmental efficiency, loss of complete independence or impartiality . . . or use the confidential information acquired through State employment.’”

“The facility has a ‘Prohibition of Exploitation’ policy that also references state statutes regarding ‘protection against financial exploitation of at-risk adults.’”

23. The Corrective Action directed Complainant to “maintain a professional and therapeutic relationship with the residents in your care. Financial discussions, and the feasibility of financial transactions with residents, shall be referred to the Social Worker. You are required to review facility policy 12.22, Prohibition of Exploitation, to serve as a reference and guide regarding your interactions with residents as it pertains to their

2005B091

finances.”

24. The Corrective Action also determined that Complainant’s removal of the Activity Participation Logs was a violation of the federal privacy law governing residents at the Veterans Center. It mandated that she not remove any resident records again.

25. The June 2004 Corrective Action notified Complainant that failure to adhere to its provisions could result in further corrective or disciplinary action, up to termination.

26. Veterans Center Policy 12.22 states in part:

“It shall be the policy of the CSVC that the facility shall not allow a person in a position of trust (staff, volunteers . . .) to take advantage of a resident to gain control of their money, property, or their life – either directly, or through a POA, a trust, marriage, adoption, or inheritance.”

“Staff, volunteers and others working in long-term care facilities are in a position of trust in relation to vulnerable residents. It shall be investigated to determine if a person has employed undue influence, duress, deception, or other false pretense over the resident when there is; . . . Extending, promising, or offering any special consideration or treatment to a resident in exchange for compensation of any kind.”

27. CSVC Code of Ethics states in part that staff “shall recognize that personal gains from their connection with Colorado State Veterans Center are limited to wages, normal employee benefits, respect, and recognition for a ‘job well done.’ It further states, **“No employee . . . will accept any money, goods, gifts, gratuities . . . loans, or engage in any business transaction with any resident without specific written permission of the Superintendent and Social Worker.”** (Emphasis added.)

28. Complainant was familiar with all of the above policies and procedures.

DM Moves in with Complainant

29. In late July 2004, DM called Complainant from the Comfort Inn, requesting to move in with her. Complainant agreed. On August 1, 2004, and she picked him up and moved him into her home.

30. Complainant did not contact the Nursing Home Administrator or the Social Worker at the Veterans Center prior to picking up DM, moving him into her home, and entering into a financial arrangement with him. She did not attempt to redirect DM to Adult Protective Services at any time.

31. DM paid Complainant \$1000.00 in rent for the month of August 2004. She accepted it.

2005B091

32. DM paid Complainant \$1200.00 in rent for the month of September 2004. Complainant accepted it.

33. DM sought to give Complainant more money than he paid her, but she would not accept it.

34. In July or August 2004, while residing in her home, DM asked for, and Complainant gave him, her full name and social security number so that he could list her in his will.

35. Complainant was aware that DM had made her the sole beneficiary in his will.

36. In late September 2004, Complainant learned that DM had made false allegations against one of her co-workers at the Veterans Center. She confronted him about it. The two had a disagreement and Complainant asked DM to move out. He was adamantly opposed to leaving her home and offered to pay her more money. She refused it and informed DM that he needed to move out soon.

37. Complainant then contacted an old friend, Jim Gallegos, who was the Chief of Police in Monte Vista, to mediate the situation. Gallegos agreed to hold a meeting with DM and Complainant present. At the meeting, Complainant made it clear she would help DM find another place to live, but that he could no longer live with her.

38. DM had spent \$13,000 on a hot tub for his own use while staying with Complainant. He had an open wound on his leg that would benefit from soaking. At the time of the meeting with the Chief of Police, it had not yet been delivered. Complainant made it clear she did not want it at her home. DM told her to have it delivered to her parents' house. That is what occurred. Complainant never made an effort to sell the hot tub so that DM could recoup some of his expenditure.

39. In late September 2004, DM left Complainant's home and moved in with friends.

40. Complainant testified that she was attempting to help DM and improve his quality of life by bringing him into her home in August 2004. This testimony is rejected as lacking credibility for the following reasons: 1. she operated in secret; 2. she knew she was violating the June 2004 Corrective Action; 3. she knew DM was extremely vulnerable, having expressed his fear that he would end up living in a card board box; 3. offered no evidence that after he moved out, she made efforts to remove herself from his will.

November 22, 2004 Corrective Actions

41. After DM moved out, no one at the Veterans Center was aware that he had resided with Complainant until December 2004. In the meantime, Complainant received two Corrective Actions in November 2004.

42. All nursing home and assisted living facilities must undergo annual audits by the
2005B091

state and federal government agencies that regulate them.

43. The Veterans Center State Survey was completed on September 15, 2004. The survey found several deficiencies in the Activities Program at the Veterans Center. Once deficiencies are found, the facility must submit a Plan of Correction ("POC") to address the deficiencies.

44. On October 13, 2004, the Veterans Center submitted its POC to the State Survey staff. Roy Moruzzi, the Veterans Center Director of Nursing, provided a list of twenty items to the State Survey staff, specifying what the Veterans Center Activities Coordinator would do to implement the POC. He gave a deadline of November 4, 2004. Moruzzi also gave this list to Complainant and Espinosa.

45. Complainant's job was to assure that all of the deficiencies were cured and that evidence of that was assembled in a "POC book" by November 4, 2004. By November 4, 2004, Complainant had given Moruzzi none of the information he needed for the POC book.

46. On November 18, 2004, Moruzzi emailed Espinosa, stating, "At the time of this writing, I have received zero (let me repeat that – 'none') items of evidence to support our claim that the activity director Connie Gonzales has corrected these problematic areas. Additionally, she has spoken to me zero times about these items." He copied the Nursing Home Administrator on the email.

47. The Veterans Center, like most nursing home facilities, hired an independent contractor to assist the agency in implementing the POC. The contractor found continuing problems in meeting the POC items in the Activities program.

48. On November 22, 2004, Respondent issued two separate Corrective Actions to Complainant. She did not grieve either one.

49. Corrective Action #1. The first Corrective Action involved three general performance problems relating to the state survey. The first involved the activities she scheduled: insufficient involvement of residents in the activities scheduled; inappropriate activities for low functioning residents; and failure to hold activities scheduled or to hold them for entire period of time scheduled. The second issue was Complainant's failure to adequately plan ahead in the scheduling of activities, causing conflicts with other department functions and staffing. The third concerned her failure to submit the POC information in a timely manner on November 4, 2004.

50. The Corrective Action directed Complainant to implement the Activity Consultant suggestions and to submit written reports/responses to the reports within one week of receipt. It further directed Complainant to make arrangements to attend a Time Management in-service by December 1, 2004, and to inform her supervisor and the Administrator of the in-service date.

2005B091

51. The Corrective action directed Complainant to submit the final draft of the activity calendar for the following month no later than the 21st of the previous month, and to submit all requests for staff assistance and for money in writing, once the activity calendar had been approved.

52. Corrective Action #2. This Corrective Action also concerned three separate issues. The first was Complainant's inappropriate communication with co-workers. In one incident, a co-worker mentioned a potential violation of the federal confidentiality law when Complainant had left a resident's medical record open on her desk. Complainant had responded, "So, and. . . ." In the second incident, Complainant and a co-worker were discussing a petty cash request, and when the co-worker mentioned she needed to talk with a supervisor, Complainant had responded, "don't tell me who to talk to."

53. This Corrective Action also cited Complainant for failing to communicate with her supervisor on several occasions regarding the dates of significant Activities Program events that were to be held at the Veterans Center.

54. The last issue concerned Complainant's failure to respond to emails. The Administrator had emailed Complainant on October 14 and November 8, 2004 concerning the POC; Complainant had not responded to those emails.

55. The Corrective Action directed Complainant to apologize to the co-workers and attend an in-service on Communicating Effectively and Non-Defense by the end of December. It further directed her to immediately inform her supervisor of all updates and changes on the activity calendar, so changes in work schedules and overtime issues can be addressed and approved. It directed Complainant to start a daily communication book listing the activities for the day with specific instructions about how the activity is to be carried out, the supplies needed, and where they can be found or purchased. Lastly, the Corrective Action directed Complainant to check her email daily and respond immediately, and to submit her POC updates by November 23, 2004.

56. Both Corrective Actions were effective "immediately and as long as you are employed at" the Veterans Center.

57. Complainant was ill during part of November 2004. Respondent granted her requests for sick leave.

58. Complainant continued her pattern of failing to respond to emails on the day they were received; many of them pertained to POC compliance.

59. Complainant failed to enroll in a Time Management course by December 1, 2004.

60. Complainant did not submit a written report/response to the Activity Consultant reports within one week of receipt.

2005B091

61. Complainant apologized to one co-worker. She did not apologize to the second co-worker, as required by the Corrective Action.

62. Complainant failed to inform her supervisor of updates and changes on the activities calendar. This led to additional conflicts with other staff and their schedules.

63. Complainant's failure to perform her duties associated with POC compliance led to Veterans Center administrators applying for and receiving an extension of time to implement the POC.

64. In December 2004, DM moved back into the Veterans Center. His condition had worsened, necessitating that he reside in the Nursing Home there, not in the assisted living facility.

65. It was at this time the facility learned that DM had resided with Complainant in August and September 2004.

66. On December 10, 2004, Respondent placed Complainant on leave with pay, pending investigation into her arrangement with DM that summer.

Pre-disciplinary Meeting

67. Respondent sent Complainant a letter providing notice of a pre-disciplinary meeting.

68. On January 24, 2005, Complainant and her union representative attended the pre-disciplinary meeting with Veterans Center Administrator Mindy Montague, who was relatively new in the position, and a DHS Human Resource Specialist.

69. When Montague asked Complainant what steps she had taken to comply with the terms of the November 22, 2004 Corrective Actions, Complainant initially responded that they were silly, petty and punitive, and that there was nothing to correct.

70. At the meeting, Complainant insisted she had not violated any agency regulations by taking DM into her home, collecting rent, and being placed in his will as sole beneficiary. Her rationale for this position was that he was not a resident at the facility at the time she picked him up and brought him into her home.

71. When asked why she had not discussed the arrangement with the Nursing Home Administrator prior to having him move in, she reiterated that DM was not a resident. She stated, "I should have discussed it with Cynthia [Bostic, Administrator]." She explained that she had discussed it with the Ombudsman.

72. At the meeting, Complainant denied having had a conversation with DM about moving into a hotel prior to moving in with her. This was not true. See Finding of Fact #16.

2005B091

73. The meeting was continued to February 3, 2005 in order for Complainant to obtain an attorney.

74. Montague concluded that Complainant had willfully violated the June 2004 Corrective Action and all pertinent agency regulations cited therein. She was also deeply concerned about Complainant not having been truthful at the pre-disciplinary meeting. She determined that termination of employment was her only option.

75. On February 16, 2005, Respondent issued a letter terminating Complainant's employment on several grounds: Exploitation of an at-risk adult for financial gain, in violation of the June 8, 2004 Corrective Action, Veterans Center Policy 12.22, the Veterans Center Code of Ethics, and State Personnel Board Rule R 1-10. The letter noted that Complainant acquired the information about DM's wealth and the fact he had no heirs while he was a resident at the Veterans Center. The letter noted that the June 2004 Corrective Action had put her on specific notice that financial discussions with residents, and the feasibility of financial transactions with residents, were to be referred to the Social Worker. Therefore, Respondent determined she had committed willful misconduct.

76. Respondent also terminated Complainant for failure to comply with the November 22, 2004 Corrective Actions, specifically: failure to submit weekly responses to the Activity Consultant reports; failure to make arrangements to attend a Time Management and Communicating Effectively in-services; failure to submit the activity calendar by the 21st of the month; failure to submit budget forms as required; failure to submit POC information to the Director of Nursing; failure to apologize to both co-workers; failure to inform supervisor of changes to the activities calendar; failure to maintain a daily communication book listing activities and how to carry them out; and failure to respond to emails.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule R-6-9, 4 CCR 801¹ and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

¹ The State Personnel Board Rules in effect at the time of the events herein have been applied. As of July 1, 2005, substantial amendments have been made to the Board Rules.

A. Burden of Proof

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. HEARING ISSUES

A. Complainant committed the acts for which she was disciplined.

Respondent has met its burden of proving that Complainant committed the acts upon which discipline was based.² Complainant violated State Personnel Board Rule R-1-10 by utilizing confidential information acquired during state employment for personal gain. Complainant learned that DM was wealthy, and had no heirs, through her position as a public employee at the Veterans Center. Complainant utilized that information for private benefit by taking him into her home, collecting rent, and allowing him to designate her as sole beneficiary in his will.

Complainant engaged in financial exploitation of DM, in violation of Policy 12.22. That policy prohibits any person in a position of trust, including staff such as Complainant, from taking advantage of a resident to gain control of their money, property, or their life—either directly, or through an inheritance. Complainant used her position at the Veterans Center to gain control of DM's life by having him move in with her. In the course of doing so, she gained control over his money and property and used her position of trust to become the sole beneficiary of his will. This entire course of conduct constitutes financial exploitation of a resident.

Complainant violated the Veterans Center Code of Ethics, which states, "No employee . . . will accept any money, goods, gifts, gratuities . . . loans, or engage in any business transaction with any resident without specific written permission of the Superintendent and Social Worker." Complainant accepted DM's entire estate, two months of rent, and a \$13,000 hot tub, without specific written permission of the Superintendent and Social Worker.

Complainant argues that the Veterans Center policies do not apply to her, because DM was no longer a resident at the time he moved in with her. Complainant directed DM to move into the Comfort Inn for a few days, prior to moving in with her. This fact does not mitigate against application of Policy 12.22 and the Code of Ethics. To the contrary, it

² With the exception of a few minor violations of the two November 22, 2004 Corrective Actions. These exceptions are so minor as to be immaterial.

constitutes aggravation, because it evidences Complainant's intent to manipulate DM's conduct so that she could get away with violating the policies and professional standards that governed her employment. See, Findings of Fact #15, #16, and #17.

Complainant also violated generally accepted standards for an Activities Coordinator in her position. Under section 24-50-116, C.R.S., "Each employee [of the State of Colorado] shall perform his duties and conduct himself in accordance with generally accepted standards" Veterans Center Policy 12.22 and the Code of Ethics codify the generally accepted standard of care for staff at the Veterans Center. Staff in nursing homes and assisted living facilities, such as Complainant, have a professional duty of care to protect and advocate for the vulnerable residents in their charge. That professional duty of care is integral to the relationship; it cannot be severed based on the venue in which the vulnerable person resides. Complainant's attempt to vitiate the duty of care she owed to DM, by having him move into a hotel, was futile. Complainant's duty to protect DM ran with the position, and it continued up to and including the time of her termination. Even assuming for the sake of argument that Complainant had the best of motives to care for DM, her conduct still violates Policy 12.22, the Code of Ethics, and generally accepted standards for an Activities Coordinator in her position.

Complainant willfully violated the June 2004 Corrective Action by failing to contact the Administrator and the Social Worker prior to taking DM into her home and entering into the financial arrangements with him.

Lastly, Respondent proved by preponderant evidence that Complainant violated several of the terms of the November 2004 Corrective Actions. Complainant argues that because she was on sick leave much of the short period between November 22 and December 10, 2004, her last day of employment, it is unfair to hold her accountable for violation of the Corrective Actions. This argument has some merit. Under State Personnel Board Rule R-6-8, corrective actions must include "a reasonable period of time, if appropriate, to make corrections."

The November 22, 2004 Corrective Actions were effective "immediately." Most of the actions required of Complainant were, in fact, immediately correctable and required very little time. For example, responding to emails, apologizing, and making a call to schedule two in-service trainings, are simple tasks that can be accomplished immediately with minimal effort. Yet Complainant continued to ignore email, failed to set up the in-services, and apologized to only one co-worker. Moreover, at the time the Corrective Actions were issued, Complainant knew that she was three weeks behind in performing the duties associated with POC compliance. Exigent circumstances existed in the agency requiring that she make the POC her top priority. Yet she failed to respond to the independent contractor's reports regarding the POC, and clearly neglected to make POC compliance her top priority. Under the circumstances presented in this case, it was appropriate for Respondent to hold Complainant accountable for her failure to immediately comply with the Corrective Actions.

B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

Complainant argues that she should not be subjected to discipline because her co-workers and supervisors harassed her to such a degree that it became a hostile work environment. Complainant failed to prove this at hearing. Instead, the evidence demonstrated that Complainant's job was a difficult one, demanding that she manage her time and prioritize appropriately to meet the needs of the agency. Complainant was unable to accomplish this. Moreover, her conduct with DM is completely unrelated to the work environment or the demands of the position.

Complainant also claims the termination was improper because Respondent was not properly classified in her position. She contends that her supervisor was aware that Complainant ought to be reclassified to a Therapy Assistant II position, but never even read the class series description for Complainant's position. Therefore, she argues, she was deprived of her right under the State Constitution to be "graded and compensated according to standards of efficient service which shall be the same for all persons having like duties." Colo. Const. art. XII, Section 13(8).

Complainant proved that she complained repeatedly about her classification level, and that she wrote on her PDQ in 2004 that she disagreed with it. However, she never submitted to her appointing authority a written request for a position evaluation, based on permanent and substantial changes to her position, pursuant to State Personnel Director's Procedure P-2-6. Under that procedure, the appointing authority has twelve months to submit the request to the department's personnel office. Having never submitted a written request for reallocation to her appointing authority, and having never filed a grievance on the issue, Complainant has waived any legal claim to a reclassification of her position.

C. The discipline imposed was within the range of reasonable alternatives.

Respondent imposed progressive discipline in this case by issuing three Corrective Actions prior to taking disciplinary action. In June 2004, Respondent put Complainant on notice that she must strictly adhere to the Veterans Center regulations designed to protect residents from staff abuse of their positions of trust. Complainant willfully violated that Corrective Action and the regulations cited therein. Under the circumstances presented

2005B091

herein, Respondent's decision to terminate Complainant was a reasonable one.

D. Attorney fees are not warranted in this action.

Attorney fees and costs shall be awarded if an action was instituted frivolously, in bad faith, maliciously, as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801. Because Complainant did not prevail in this matter, she is not entitled to an award of attorney fees and costs.

CONCLUSIONS OF LAW

1. Complainant did commit the acts for which she was disciplined;
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law;
3. Respondent's action was within the range of reasonable alternatives;
4. Attorney's fees are not warranted.

ORDER

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice.

Dated this 10th day of November, 2005.

Mary S. McClatchey
Administrative Law Judge
633 – 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11-inch paper only. Board Rule 8-73B, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-75B, 4 CCR 801. Requests for oral argument are seldom granted.

2005B091

CERTIFICATE OF SERVICE

This is to certify that on the _____ day of November, 2005, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Matthew Hobbs, Esquire
Law Office of Eugene Farish, P.C.
739 First Avenue
P.O. Box 430
Monte Vista, CO 81144

and in the interagency mail, to:

Joseph Haughain
Assistant Attorney General
Office of the Attorney General
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Andrea C. Woods